United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

To Be Argued by:
Richard K. Hughes

Docket No. 76-6176

In The

United States Court of Appeals

For the Second Circuit

B

FRANCISCO BANARIA, LUZUIMINDA BANARIA, and RIEL BANARIA,

Plaintiffs-Appellants,

P/S

— *against* —

BENEDICT FERRO, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of New York

BRIEF FOR DEFENDANT-APPELLEE

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Syracuse, New York

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STATEMENT OF ISSUE

DID THE DISTRICT COURT PROPERLY DENY THE PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION ON GROUNDS THAT THERE WAS LITTLE LIKELIHOOD OF PLAINTIFFS' ULTIMATE SUCCESS ON THE MERITS OF THEIR TWO CLAIMS FOR RELIEF.

STATEMENT OF THE CASE

On May 29, 1972, the plaintiffs, FRANCISCO BANARIA, LUZUIMINDA BANARIA, and RIEL BANARIA, aliens and citizens of the Philippines, were duly admitted into the United States at New York, New York, as temporary nonimmigrants,

pursuant to Title 8, United States Code, Section 1101(a)(15)(H). The aliens were authorized by the Immigration and Naturalization Service to remain in this country in that "H" status, with the appropriate annual extensions, until April 30, 1975. A nonimmigrant visa petition had previously been submitted on Mrs. Banaria's behalf, by her former employer, Saratoga Hospital, Saratoga Springs, New York, on account of Mrs. Banaria's profession as a registered nurse, in accordance with Title 8, United States Code, Section 1184(c). (JA-47) The "H" status of FRANCISCO BANARIA and RIEL BANARIA is dependent upon the "H" status of LUZUIMINDA BANARIA.

On August 2, 1972, Mrs. Banaria filed a third preference visa petition under Title 8, United States Code, Section 1153(a)(3), with the Immigration and Naturalization Service. That petition was approved by the Service on or about July 16, 1973. (JA-49).

On March 21, 1975, Mrs. Banaria allegedly gave birth to an American citizen, who is not a party to this action. The aliens failed to file a timely extension of their nonimmigrant "H" status, with the Service and that legal status lapsed on April 30, 1975. (JA-21, 45, 47, 51 and 52).

The aliens have alleged that this neglect was excusable on account of "circumstances surrounding Mrs. Banaria's pregnancy" and "complications surrounding the birth of their child", (JA-45, Appellant's Brief - 4-5), but no evidence justifying this eleven month delay has ever been provided either to the District Director, to the Immigration Judge, to the District Court, or to this Court, (JA-47, 6 and 66-67).

On March 4, 1976, Mrs. Banaria's new employer, St. Clare's Hospital, Schenectady, New York, which had employed this alien without either the knowledge or approval of the Immigration and Naturalization Service, (JA-10-11), submitted a nonimmigrant visa petition to the Service on Mrs. Banaria's behalf. (JA-48). The Hospital's petition was approved by the

District Director on April 29, 1976, with the express condition that Mrs. Banaria was scheduled for an immigration hearing on May 5, 1976, concerning her lapsed status. (JA-48).

On March 30, 1976, the officer in charge of the Albany, New York Office issued two Orders To Show Cause, under Title 8, Code of Federal Regulations, Section 242.1(a), alleging that the Banarias should be deported, pursuant to Title 8, United States Code, Section 1251(a)(2), for remaining in the United States beyond April 30, 1975, without the authority of the Service. (JA-51, 52).

On April 6, 1976, the attorneys for the aliens requested that the aliens be placed back into their lapsed nonimmigrant "H" status or that they be granted indefinite voluntary departure because of Mrs. Banaria's approved third preference visa petition. (JA-45-46).

On May 4, 1976, the Service denied the aliens' request to reinstate their "H" status since Mrs. Banaria did "not appear to be a bonafide nonimmigrant, in that it has not been established that she intends to depart from the United States within a definite time and that she has a residence abroad to which she intends to return," the two statutory requirements under Title 8, United States Code, Section 1101(a)(15)(H). (JA-47).

On June 1, 1976, the District Director also denied the aliens' alternative request for indefinite voluntary departure since the applicable provision in the Service's Operations and Instructions Manual, Section 242.10(a)(6), had been rescinded on July 31, 1972, thr[illegible]rior to the filing of Mrs. Banaria's third preference visa p[illegible]n with the Service. (JA-50).

After a prior adjournment at their request, the aliens' deportation hearing was conducted on June 7, 1976, before Immigration Judge Gordon W. Sacks. At this hearing, the aliens were ably represented by their present attorneys, Barst and Mukamal, specialists in administrative immigration law.

The attorneys consumed most of the deportation hearing discussing the aliens' "forthcoming" District Court action, actually filed three months later, attacking the District Director's issuance of the two Orders To Show Cause, and seeking another adjournment of the hearing. (JA-2-5). No evidence was presented to the Immigration Judge that the aliens' presence in this country was temporary, that they maintained a permanent domicile in the Philippines, or that their lapse of "H" status was excusable.

At the conclusion of the hearing, the aliens were ordered deported, were granted a voluntary departure until September 7, 1976, and were advised of their ten-day period of appeal, under Title 8, C.F.R., Section 242.21, to the Board of Immigration Appeals, by the Immigration Judge. (A-19 and 13-14).

The aliens did not appeal the Immigration Judge's Order of Deportation. On or about September 14, 1976, three Warrants of Deportation were issued by the District Director, pursuant to Title 8, C.F.R. Section 243.2, the execution of which has been temporarily stayed by Order of this Court, dated November 3, 1976.

By Memorandum-Decision and Order, dated October 21, 1976, the Hon. James T. Foley, Chief U.S. District Judge, denied the plaintiffs' application for a preliminary injunction, pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, holding that there was,

> "little likelihood of success of plaintiffs showing that jurisdiction exists in this (District) Court to adjudicate either of their claims (for declaratory and injunctive relief) or that there is sufficient merit even if the claims were reached." (JA-68).

The matter is now before the Circuit Court on an interlocutory appeal by the plaintiffs from the District Court's Order, pursuant to Title 28, United States Code, Section 1292(a)(1).

ARGUMENT

THE DISTRICT COURT PROPERLY DENIED THE PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION ON GROUNDS THAT THERE WAS LITTLE LIKELIHOOD OF PLAINTIFFS' ULTIMATE SUCCESS ON THE MERITS OF THEIR TWO CLAIMS FOR RELIEF.

Both the District Court and the Appellants have properly stated the well-established test in the Second Circuit for the lower court's issuance of a preliminary injunction, under Rule 65(a) of the Federal Rules of Civil Procedure, as stated in *Triebwasser & Katz* vs. *American Telephone and Telegraph Co.*, 535 F.2d 1356, 1358 (2d Cir. 1976). (JA-61, Appellant's Brief - 12).

In *Triebwasser & Katz, supra,* at page 1358, this Court went on to state,

> "It is equally familiar law that the granting of preliminary injunctive relief lies within the sound discretion of the District Court and will not be disturbed unless there is an abuse of that discretion. *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931-32, 95 S.Ct. 2561, 2567-2568, 45 L.Ed. 2d 648, 659-660 (1975), or unless there is a clear mistake of law, *414 Theater Corp.* v. *Murphy*, 499 F.2d 1155, 1159 (2d Cir. 1974); *Exxon Corp.* v. *City of New York*, 480 F.2d 460, 464 (2d Cir. 1973)."

Appellants have now concentrated exclusively on the District Court's primary finding that it lacked jurisdiction over the subject matter of plaintiffs' two claims for relief, and have overlooked the alternative finding of the lower court that even if it did enjoy jurisdiction, there was no showing by the plaintiffs of any merit to either of these claims. (JA-63, 65-67 and 68).

It has been unclear to the Immigration Judge, to the defendant and to the District Court, exactly what action(s) of the District Director the plaintiffs are challenging as being "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Title 5, United States Code, Section 706(2)(A).

Plaintiffs have challenged the District Director's issuance of the two Orders To Show Cause, (JA-2-5), and the District Director's refusal to reinstate the aliens' lapsed "H" status before both the administrative and judicial forums, (JA-6-7, 16, 19, 21, 62-63).

In addition to the absence of any proof that the aliens' eleven-month delay was excusable, no evidence has been presented to any of these forums that the District Director's denial of the appellants' application for reinstatement, extended voluntary departure, or the exercise of the District Director's prosecutorial discretion under Title 8, Code of Federal Regulations, Section 242.1,[1] was discriminatory, that is, "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification," *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962).

Although argued extensively in the court below, the appellants now appear to have abandoned their second claim for relief, that is, a declaration that the Service's revocation of former Section 242.10(a)(6)(ii) of its Operations and Instructions Manual on July 31, 1962, was void on account of its failure to give notice to the public of this change of policy in light of the controlling authority of this Court as stated in *Noel* v. *Chapman*, 508 F.2d 1023, 1029-1030 (2d Cir. 1975), *cert. denied*, 423 U.S. 824 (1975), relied upon by the District Court. (JA-67-68).

It is admittedly an open issue whether the District Court possesses original jurisdiction to review the District Director's refusal to reinstate the aliens' lapsed "H" status, despite the statutory prohibitions of Title 8, United States Code, Section

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[1] An Order To Show Cause, initiating an administrative deportation hearing, "is comparable to an indictment in a criminal proceeding or complaint in a civil action." *Chlomos* v. *U.S. Department of Justice, Immigration and Naturalization Service*, 516 F.2d 310, 312 (3rd Cir. 1975).

1105(a) and (c) and what the District Court found to be its "intimate and immediate association" with the Order of Deportation, (JA-64), on the premise that the Immigration Judge had no jurisdiction or authority to reinstate this status, *Matter of Sourbis*, 11 I & N Dec. 335 (BIA 1965), and thus a direct appeal from the Board to this Court may not have been possible.[2] *Colato* v. *Immigration & Naturalization Service*, 531 F.2d 678, 680 (2d Cir. 1976).

As the District Court did in its Memorandum-Decision, (JA-65-68), assuming *arguendo* that the lower court had jurisdiction over this claim, it is clear that the plaintiffs have failed in demonstrating any likelihood of success on the merits.

In their Brief, at page 2, appellants assert that the April 6, 1976, application for reinstatement of the aliens' status, (JA-45-46), was made under Title 8, United States Code, Section 1258. It is clear that the aliens' were not eligible for such a change of status since the aliens were no longer in a valid nonimmigrant classification as of May 1, 1975. Title 8, Code of Federal Regulations, Section 248.1.

It is irrelevant to the issue of reinstatement of lapsed nonimmigrant status that the plaintiff, LUZUIMINDA BANARIA, is presently the holder of an approved third perference visa under Title 8, United States Code, Section 1153(a)(3), (JA-48), *Bowes* v. *District Director*, 443 F.2d 30, 31 (9th Cir. 1971). The absence of discriminatory enforcement by the District Director has been discussed, *infra*. .

Contrary to appellants' assertion that these aliens "had been in substantial compliance with the terms and conditions of (their) entry," the record clearly indicates otherwise. Violations included an unauthorized change of professional employment by LUZUIMINDA BANARIA, (JA-10-11), unauthorized

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[2] It is interesting to note that despite this jurisdictional argument, such an attempt was made by plaintiffs at the administrative hearing. (JA-7).

employment by FRANCISCO BANARIA, (Admin. Transcript, pgs. 28-29), and extended illegal status of all three aliens in the United States, (JA-19). Title 8, United States Code, Section 1101(a)(15)(H), defines a nonimmigrant alien, in pertinent part, as

> "(H) an alien having *a residence in a foreign country which he has no intention of abandoning* (i) who is of distinguished merit and ability and who is *coming temporarily to the United States* to perform services of an exceptional nature requiring such merit and ability; . . .and the alien spouse and minor children of any such alien in this paragraph if accompanying him or following to join him." (Emphasis added)

The two grounds forming the basis for refusal of the District Director to reinstate the aliens' "H" status have already been set forth in the Appellee's Statement of the Case, and are consistent with the requirements of Title 8, United States Code, Section 1101(a)(15)(H), (JA-47). Both the Immigration Judge and the District Court have held that this refusal was reasonable and consistent with the applicable provisions of the Immigration and Nationality Act of 1952. (JA-7, 63, 64 and 66-67). These findings are entitled to be afforded great weight and should not be overturned by the Circuit Court, in the absence of clear and convincing evidence to the contrary.

CONCLUSION

For all the foregoing reasons, the Order of the United States District Court for the Northern District of New York, dated October 21, 1976, denying the plaintiffs' motion for a preliminary injunction should be in all respects affirmed.

Respectfully submitted,

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~~XXXXXXX~~ Docket No.: 76-6176

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